

2 November 2011

Original: English

**United Nations Commission
on International Trade Law**
Working Group III (Online Dispute Resolution)
Twenty-fourth session
Vienna, 14-18 November 2011

Resolution process designated by the draft ODR rules

**Note submitted by the Institute of International Commercial Law
(Pace Law School), the National Center for Technology and Dispute Resolution
and the InternetBar.Org Institute**

I. Introduction

1. The Institute of International Commercial Law (Institute) has had the fortunate opportunity to be involved in the work of UNCITRAL on online dispute resolution (ODR) via its co-sponsorship of the Colloquium on ODR in March 2010; its submission of the Paper supporting the possible future work on online dispute resolution by UNCITRAL (A/CN.9/710); its submission of a subsequent paper on Creating a cross-border online dispute resolution data exchange system (A/CN.9/WG.III/XXIII/CRP.2); and its participation as an observer NGO in the Working Group III sessions to date. The Institute has also co-sponsored conferences around the world on ODR and has presented and published papers on ODR regarding the resolution of cross-border disputes.
2. This paper respectfully addresses the issues stemming from the inclusion of arbitration into the current draft ODR procedural rules (Rules), specifically as it relates to the fulfilment of the objectives of the mandate.

II. Scope of Working Group III's mandate

3. It is the understanding of the Institute that the current mandate of WG III is limited to ODR relating to low-value cross-border e-commerce transactions. Specifically, it has been stated:

“The view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical



way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes world-wide and required a dispute resolution response which was rapid, effective and low-cost.” (A/CN.9/716, January 17, 2011).

4. At first glance, in the scheme of all possible disputes that could arise, this scope seems exceptionally limited. However, disputes over the sale of goods via online transactions will easily reach the millions (annually),¹ to be resolved in a matter of weeks for each dispute. This is compared to traditional international arbitration — where the major institutions receive on average 600-1000 new cases a year, to be resolved in several months or years. Some of the reasons for the magnitude of the projected case load are due to exponential worldwide usage of technology — particularly mobile phones — to transfer money and/or directly purchase goods; and (2) most of the world provides no practical redress mechanism for the type of dispute described by the mandate. Traditional arbitration mechanisms offered by arbitral institutions do not provide a practical option for the type of dispute covered by the mandate and buyers cannot realistically afford to enter foreign courts to resolve a low value dispute. Given these considerations, the limited mandate of the Working Group is quite appropriate.

5. ODR has the potential to open redress channels for millions of people going forward — but the idea is still brand new with limited working examples — so this first project of the Working Group is the petri dish for the possibility of ODR.

III. Proposed ODR procedural rules

6. The Rules propose a two-phase system to resolve disputes. The first is negotiation to be conducted online, using software applications to manage the process between the two parties. The second phase is arbitration, in which the arbitrator has the discretion to pursue a facilitated settlement option if appropriate. If it is not appropriate, an arbitrator will render a final and binding award based on the documents submitted by the parties, without a hearing.

7. Arbitration represents one of the many options for dispute settlement that could have been included in the Rules. In the alternative, the Rules could have been limited to negotiation and/or conciliation. These processes, however, would arguably provide users with little protection or incentive to comply as they do not produce “awards” or “binding decisions/judgments”. Instead of arbitration, the Rules could have provided for “evaluation” — a term which suggests that a dispute

¹ The OECD reported that in 2009, the worldwide value of online payments was estimated at EUR 790.1 billion and was expected to reach EUR 1,382.3 billion in 2012. Similarly, the value of global m-payments was estimated at EUR 41.5 billion in 2009 and was expected to reach EUR 140 billion by 2012. [Source: Draft Report on Consumer Protection in Online and Mobile Payments, Organisation for Economic Co-operation and Development, 7 Sept 2011]. In the US alone, “[d]uring the five years from 2010 forward, the total dollar volume of online sales is projected to rise 78 per cent to \$443 billion or 9.2 per cent of the total volume of retail sales anticipated in 2015 for the U.S. market. [Source: 2010 Online Retail Payments Update and Forecast: Shift in Consumer Payment Behavior — A Temporary Reaction or a New Reality? Javelin Strategy & Research, December 2010]. Based on the total value of online transactions, it is reasonably deduced that even a small percentage of transactions arising in dispute will total in the millions. This conclusion is further based on the Paypal ODR system which resolves approximately 60 million low-value disputes a year.

be evaluated and decided by a third person, but again does not result in an “award” or “binding decision/judgment”. As the alternatives do not currently provide any safeguards for compliance in a cross-border environment, the use of arbitration seems appropriate. However, in the course of the Working Group, it appears some polarizing issues have arisen due to the inclusion of arbitration, namely:

- Whether the Rules sanction the use of pre-dispute arbitration agreements?
- Whether the Rules are appropriate to handle B2B and B2C disputes?
- Whether the ODR system should render final & binding awards, or if Claimants should also have recourse within national courts to resolve the dispute?

8. Below the practical application of the Rules is considered along with the types of disputes that will be handled under the Rules. Looking at the practicalities, the debate around these issues is narrowed considerably.

IV. Practical application of ODR procedural rules

9. With the understanding of the mandate, we can begin to conceptualize how and in what context the ODR Rules may be applied by the global trading community. This understanding is necessary to determine the process that should be established within the Rules and to help clarify the aforementioned issues regarding the inclusion of arbitration.

10. There are two primary foreseeable audiences for the Rules: (1) Internet and mobile phone intermediaries (i.e., payment channels, e-commerce intermediaries (Amazon, eBay, Alibaba), search engines, social networking sites, mobile phone applications); and (2) governments. Although independent ODR providers do exist, for the value and volume of dispute, it is reasonable to assume that Internet intermediaries and governments will accredit and outsource to ODR providers to provide platforms. ODR providers detached from Internet intermediaries or governments will likely resolve significantly lower numbers of disputes as they have to attract sellers (and have them fund the system) as well as make buyers aware of their service. ODR providers and arbitral institutions will likely maintain an independent service role in larger-value, classical B2B disputes.

11. As such, the use and benefit of arbitration in these two environments must be assessed. If an ODR system rests within the Internet and mobile phone intermediaries (e.g., the Paypal ODR system), it is a reasonable extension of assumption that sellers will be bound via contract with the Internet or mobile phone intermediary to use the system and buyers will have the option to use the system. So the system takes care of binding the seller, gives the buyer an option and handles enforcement (via the intermediary channel). In this context the Rules are necessary to make sure the intermediaries offer sellers and buyers a fair process. Governments will have oversight ability via their accreditation of ODR providers. This standardization and transparency in the Rules and process is necessary as it will be the only practical remedy if the seller’s customer service options do not satisfy.

12. With regard to this scenario, would including arbitration hinder or cause detriment to the process? In theory, no. In fact, its application could provide a

benefit by factoring in procedural safeguards that are part of international arbitration doctrine, even if they are not expressly stated in the Rules. However, in looking purely on the basis of outcome, given that sellers are bound to the process via contract with the Internet or mobile phone intermediary and enforcement is secure, arbitration is as effective as evaluation in this context.

13. In the context of a government sponsored/accredited ODR programme, the playing field is different. First and foremost, the ODR system represents a redress option sanctioned by the government, so governments knowingly and with oversight provide their citizens with the alternative channel to their national courts (and they do so presumptively because they realize for this type of dispute, national courts are not a realistic or practical option — for the parties or the courts). Most likely, governments will accredit and then outsource this work to ODR Providers. In contrast to the scenario with the Internet and mobile phone intermediaries, sellers are not bound to use the system. Moreover, there is no automatic enforcement mechanism. So there is value in having an “award” although it represents somewhat of a paradoxical situation. Although ODR Rules are being created because courts are not looked as an efficient or practical forum to resolve millions of low-value disputes, decisions rendered under a government-sponsored/accredited ODR system will necessarily rely on national courts to enforce awards, if voluntary compliance cannot be obtained. If this is the model States are pursuing in the Working Group, then there is a benefit to obtaining an award from an arbitration process. Indeed, an “award” might compel compliance without court intervention. Moreover, arbitration provides an award that can be reviewed by national courts under existing standards of review (stemming from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The concern in this scenario, however, is not with the process, but the practical reality of buyers bringing awards cross-border for enforcement.

V. Issues before Working Group III on arbitration

14. As mentioned above, three primary issues arise in the context of arbitration during the Working Group III discussions. Based on the comments in this paper, each issue is addressed in turn:

- Whether the Rules sanction the use of pre-dispute arbitration agreements?
- Whether the Rules are appropriate to handle B2B and B2C disputes?
- Whether the ODR system should render final & binding awards, or if Claimants should also have recourse within national courts to resolve the dispute?

A. Whether the Rules sanction the use of pre-dispute arbitration agreements?

15. In designating the two-stage process, the Rules have remained silent as to whether the buyer and seller agree to use this process pre or post dispute. Some States have argued that their national laws prohibit the use of arbitration in any context when a consumer is a party. Other States have debated this point, citing

international treaty obligations, lack of practical recourse to national courts, and a differentiation between the standards for domestic disputes and international disputes. The underlying issue is whether States are willing to provide parties with the right to exercise their own autonomy to agree to seek redress in an ODR system created by States when States recognize Court redress is an otherwise fictitious possibility given practical considerations?

16. First and foremost, as a practical matter, this issue does not need to be addressed in the Rules but can be addressed at a national level. Second, if addressed in this Working Group, the issue should be looked at in the context of where the systems will lie. If the ODR system is a government sponsored/accredited alternative to courts, then why would governments be hesitant to allow the parties to agree to use such a certified system? Particularly as it might be the only way to ensure the seller participates in the system. Similarly, if it is a system which sits in the Internet intermediary but is provided by government accredited ODR providers, why would a national government be hesitant to sanction the system? Millions of these disputes exist (as evidenced by the Paypal system which handles 60 million disputes a year) but consumers currently have no redress mechanism, other than reliance on customer service support offered by a seller. The choice is not between Court or ODR. It is between a government sponsored/accredited ODR system or no option.

17. It is recommended that guidelines for notices to buyers and sellers at all stages of the process be established in these accreditation standards to ensure a full and fair notice to buyers when they enter into the agreement to use ODR.

B. Whether the Rules are appropriate to handle B2B and B2C disputes?

18. Yes, given the scope of the mandate, the Rules are appropriate and desirable to handle both low-value B2B and B2C disputes. As mentioned in previous papers submitted by the Institute, the lines are blurred between B2B and B2C in an online environment for low-value transactions. With that said, these Rules are not suitable for higher-value B2B disputes, given the intentional simplicity. For this category of dispute, UNCITRAL has already created and recently revised their Arbitration Rules. It is proposed that a supplemental commentary be drafted for the Arbitration Rules to explore how they may be applied in the online context.

C. Whether the ODR system should render final & binding awards, or if Claimants should also have recourse within national courts to resolve the dispute?

19. The issues that arise in the context of the discussion on pre-dispute binding arbitration clauses are essentially the same for this issue and we defer to our conclusions reached in that section. We further note, however, the importance attached to the setting of the ODR environment, particularly if it is a government-sponsored or accredited ODR system. In this scenario, it is the government that is providing its citizens with a redress option that is otherwise not available. By including arbitration in the process (as opposed to only conciliation or

evaluation) it is adding one more safeguard to the process via the review of awards by national courts. Given that governments have built in the procedural safeguards, it seems counter-intuitive to object to the system because it provides final and binding awards. Moreover, as stated above, in a government sponsored system, arbitration awards are one of the more practical ways to obtain voluntary compliance and avoid national courts for enforcement. Even if regional courts were desirable for the purpose and established, it is hard to conceptualize a public court system that could account for the resolution of millions of disputes that arise from online transactions.

20. On a concluding note, we add that although the inclusion of the term “arbitration” does provide for traditional safeguards, providing some level of “security” in its well-established doctrine related to issues of validity, process and enforcement, it does not necessarily provide the flexibility for technological innovation to impact the process as a “fourth party.” Given the pace of change — e.g., new payment structures and currencies interacting with social networking platforms — the industry can possibly come up with more effective processes and enforcement mechanisms for these high-volume, low-value disputes. By using “arbitration” instead of a more flexible concept, the Working Group may preclude these possibilities, cause negative consequences to the well-tuned machinery of arbitration or encourage providers to circumvent these Rules. If providers do not require pre-dispute agreements or render final and binding awards, what is to stop them from offering a more progressive non-binding option. In this scenario, governments would lose a critical oversight role.